In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA, complainant, *vs.* JOSEPH F. SHIPP, ET AL. } No. 5, Original.

REPLY BRIEF FOR J. F. SHIPP.

May It Please the Court:

On the 28th day of May, 1906, the United States of America, through its Attorney-General, filed in this Court an information against the defendants, J. F. Shipp and others, charging them with being guilty of contempt of this Court. After setting out the fact that Ed. Johnson had been indicted and tried on a charge of rape in the Circuit Criminal Court of Hamilton County, Tennessee, convicted and sentenced by said Court to be hanged, as set forth in the proceedings in said cause, that said Johnson filed, on the 3rd of March, 1906, a petition for writ of *habeas corpus* in the United States Circuit Court for the Northern Division of the Eastern District of Tennessee, alleging certain things not necessary to set out here, asking a writ of *habeas corpus* and to be released from imprisonment; that this petition was by said Court denied and proceedings stayed for ten days

and the prisoner remanded to the jail of Hamilton County to await further action in said cause. Thereafter, on the 17th of March, 1906, application was presented to Hon. John M. Harlan, Associate Justice of this Court, asking that an appeal be allowed to this Court from the judgment rendered by said Circuit Court, March 10th, 1906, denying said writ of *habeas corpus*, which was allowed by said Justice, and thereafter, on the 19th of March, 1906, a motion was made in this Court for an order allowing an appeal, which was granted.

It is alleged in said information that on the 19th of March, 1906, after making said order, the Clerk of this Court notified defendant Shipp, sheriff of Hamilton County, of the making of said order and stay of proceedings against Johnson by said Court, and that he should retain custody of said Johnson pending said appeal; that this information was received by said sheriff before 6 o'clock on the evening of March 19th, 1906, and that the proceedings were published in said city giving a full account of this action of this Court.

The information then charges that defendant Shipp, as the Sheriff of Hamilton County, Tennessee, was the custodian of the jail of said County in which said Johnson was held a prisoner. The names of several of the sheriff's deputies are set out. The information then charges:

> "That said sheriff and deputies, on the said 19th of March, 1906, after being advised of the action of this honorable court, were informed and had every reason to believe from current reports, rumors

conveyed to them and each of them, that an attempt would be made on the evening of said day or early in the morning of the following day by a mob composed of a *large number of armed men* to force an entrance into said county jail for the purpose of taking therefrom by violence and unlawful means the said Ed. Johnson and putting him to death; that notwithstanding said rumors and said reports, which were conveyed to said sheriff and his deputies as aforesaid, the said sheriff withdrew from said jail early in the evening of said day the usual and customary guard and left in charge thereof only the night jailor, to-wit, Deputy Sheriff Jeremiah Gibson, and committed other acts and did other things evincing a purpose and disposition on the part of said sheriff to render it less difficult and less dangerous for said mob to prosecute and carry into effect its unlawful design and purpose, to-wit, the lynching of said Ed. Johnson, designed and planned as aforesaid."

(*See Par. 4, Information, R. p. 4.*)

It is further charged that the defendant Shipp, together with his deputies, and a large number of other persons, some of whose names were set forth in the information, and others who were alleged to be unknown to complainant, did unlawfully and wrongfully combine, conspire, confederate, and agree together to break and enter the county jail of Hamilton County for the purpose of taking the person of the said Ed. Johnson to lynch and murder him.

It is further charged that, between the hours of nine and twelve on the evening of March 19th, 1906, a large number of persons, including the defendants named in the information, with the exception of the defendant Shipp and his depu-

ties, formed a mob and unlawfully and wrongfully entered the jail of Hamilton County, Tennessee, with force and arms, broke open the cell in which the said Ed. Johnson was confined, took him forcibly from said jail, and killed him, and it is charged that this defendant Shipp and his deputies were in sympathy with the mob and " did in truth and in fact aid and abet said mob in the performance of said unlawful act in lynching and murdering said Johnson."

Defendant Shipp (as well as his deputies) filed an answer specifically denying each and every allegation made against him in said information. All the preliminary questions of law involved in this case have heretofore been settled by this Court (*203 U. S.*, 563.)

This Court appointed the Hon. James D. Maher special commission to take the proof in this case at Chattanooga, Tennessee, and a great volume of testimony has been taken and a large number of witnesses introduced by both sides.

In their brief, counsel for the Government, at page 5, state the issues tersely as follows:

> 1st. "Were the sheriff and his deputies informed and did they have every reason to believe that an attempt would be made in the evening of March 19th, by a mob, to break into, and take Johnson from the jail for the purpose of lynching him?
>
> 2nd. "Did the sheriff and his deputies commit acts and do things manifesting a purpose and disposition on their part to render it less difficult and less dangerous for the mob to lynch Johnson and aid and abet the mob?
>
> 3rd. "Were the defendants, excepting Shipp

and Gibson, members of the mob which lynched Johnson, or did they participate in the conspiracy?

4th. "Did defendants in the things they did intend to show contempt of the order of this court and to prevent it from hearing Johnson's appeal?"

The third issue thus tendered by the Government does not refer to the defendant Shipp. We will discuss these issues in the order thus presented by the counsel for the Government.

DID SHERIFF SHIPP EXPECT THE MOB ON MARCH 19TH.

Or, as stated in the brief of counsel for the Government:

> *"Were the sheriff and his deputies informed and did they have every reason to believe that an attempt would be made in the evening of March 19th by a mob to break into, and take Johnson from, the jail for the purpose of lynching him?"*

The record in this case shows that the Government sent agents and detectives to Chattanooga and Hamilton County, and investigated this case thoroughly with every possible facility for ascertaining the exact facts of the case. Many weeks were consumed in the examination of witnesses in Chattanooga, yet the Government absolutely failed to establish, by any proof, this insistence. On the contrary, the testimony of practically every witness who testified on this subject, including many of the very best citizens of Chattanooga, clearly establishes the fact that there was no thought of a mob on March 19th, and that no one apprehended any

mob violence at that time. On this subject counsel for the Government, in their brief (page 23), say:

> "But the evidence tending to show that a lynching was not expected to occur on the 19th, *if not knowingly false*, establishes great ignorance of the witnesses as to actual conditions. *It is utterly unreasonable to say that the lynching of Johnson was not expected to occur then.*"

Who are the witnesses who fall under this severe criticism and condemnation of the counsel for the Government?

We will briefly refer to the testimony of a few of them:

Judge C. D. Clark, Judge of the United States District Court for the Middle and Eastern Districts of Tennessee, testified that he had lived in Chattanooga continuously from 1883. He heard Ed. Johnson's application for writ of *habeas corpus*, denied the same and granted the ten days' stay of execution. He was asked:

> Q. "Judge, did anything occur at that time, was anything said at the trial on the part of the representatives of the State, or on the part of anyone, that caused you to apprehend any mob violence to this man?"
>
> A. "Not in the least."
>
> Q. "I will ask you after you returned to Chattanooga, after Judge Harlan granted his order, and after the appeal was granted by the Supreme Court, if that order of the United States Supreme Court and of Judge Harlan caused you to apprehend any mob violence?"
>
> A. "*No, sir; it did not.* I will tell you what did occur. On account of the decidedly emphatic charges in the petition and some statements that were

made on the trial by certain witnesses to the effect that the attorneys for the defense had been to an extent intimidated in making the defense for fear the colored man would be lynched if they interposed the defense — this went mainly to the jury question and how it was made up — I asked my secretary on the day that I was h[illegible] Monday, on my way to St. Augustine, if he [illegible]rd of any suggestion or hint of any violence o[illegible]atisfaction with the situation; and he told me he had not."

Judge Clark notified the attorneys for the defendant that he would remain in Chattanooga until Friday night. He also notified the State's officers to consider Johnson in the custody of the United States Government.

Again Judge Clark was asked:

Q. "I will ask you, Judge, if you had apprehended danger to the man, or if application had been made to you, if you would not have ordered his removal to some other jail?"

A. "If it had appeared that the prisoner was in real or great danger, if that had appeared to me, I am quite sure I would have made the order of my own motion. I would have called up his attorney and suggested that he make the application for his removal. I am telling you now how I think I would have acted in such a situation as that."

R. pp. 879, 880, 881.

T. S. Wilcox, Chairman of the Board of Public Safety, was examined as a witness on behalf of the Government against the defendants. Mr. Wilcox was at the head of the police department in Chattanooga and it was his duty to look after the preservation of peace and good order in the

city; and who, more than any other man, perhaps, in the city, was in a position to know the state of public feeling, and whether or not a mob was to be expected at the time Johnson was lynched. On cross-examination he was asked:

> Q. "At the time Johnson was actually taken out, Mr. Wilcox, and at some time prior to that, I will ask you if the state of public excitement had not subsided?"
>
> A. "Yes, sir; that is, to the best of my knowledge. It looked that way to me."
>
> Q. "I will ask you if there was any public or general apprehension or any belief that Johnson would be lynched, and whether or not the lynching of Johnson did not come as a great surprise to the public?"
>
> A. "It did to me."
>
> Q. "Had you suspected anything of the sort?"
>
> A. "No, sir."
>
> *R. pp.* 376.378.

A. J. Ware was introduced as a witness by the Government, and his testimony is relied upon by the Government, perhaps, more than that of any other witness introduced against the defendants. On cross-examination, he was asked:

> Q. "The excitement had all subsided practically at that time in regard to this rape, had it not?"
>
> A. "Well, it was not like it had been."
>
> Q. "You were not expecting any lynching?"
>
> A. "No, sir."
>
> Q. "And the public were not expecting any lynching, so far as you knew?"

A. "I think not."

Witness stated that he was a justice of the peace, and a great many people congregated at his office, and there was no public excitement that led him to expect any trouble or violence.

R. pp. 397, 398.

Dr. A. W. Boyd (*R. pp.* 502, 503), Dr. Cooper Holtzclaw (*R. pp.* 570, 571), Dr. M. J. Lewis (*R. p.* 794): These gentlemen are all practicing physicians and had all practiced in Chattanooga for many years. In their practice, each came constantly in communication with all classes of people, and all of them testified that there was no excitement on March 19th, and they heard no talk or suggestion of mob violence, and that the people of Chattanooga did not expect a mob at that time.

Rev. J. W. Bachman, the pastor of the First Presbyterian Church in Chattanooga, who had lived in Chattanooga and held that position for thirty-four years — the unquestioned head of the Chattanooga priesthood and the most beloved citizen in Chattanooga — testified that his office was very near the jail; that he mixed and mingled with the citizenship of Chattanooga generally and with all classes of people; he had taken great interest in the case and had been consulted, as an old citizen, by the sheriff and judge of the Criminal Court about protecting the prisoner and insuring him a fair trial. His testimony shows that he kept up with the case and was in a position to know the state of public feeling in Chattanooga. He was asked:

Q. "Was there anything, in your judgment,

knowing the public as you did, to cause a reasonably prudent officer to suspect that Johnson was in danger of being lynched at the time he was lynched?"

A. "I would not think so at all. I had no thought of it, and I did not know of any man at the time that had any thought of it. *It was a surprise to us all — a very great surprise.*"

R. p. 926.

Rev. Ira M. Boswell, the pastor of the Walnut Street Christian Church, of Chattanooga, Tennessee, testified that he had been pastor of this church four years and was a member of the Pastors' Union, an organization of the evangelical ministers of the city; also, a member of the Law and Order Committee of this Union, whose duty it was to investigate the violations of any law and the general welfare of the city; and also a fraternal delegate to the Central Labor League of the city, an organization composed of delegates from all the labor organizations in the city. He also preached regularly at the large manufacturing shops in the city. In this way, Dr. Boswell kept in touch with the public sentiment in Chattanooga and was certainly in a position to know the situation at the time this lynching occurred. He was not in sympathy with the mob; on the contrary, had preached a sermon denouncing the first mob that attempted to lynch Johnson. The witness stated:

"I never dreamed there was anything like a lynching would take place; no one else had mentioned it."

R. pp. 866 *to* 871.

Rev. W. C. Robertson, Rector of the Episcopal Church in Chattanooga, testified that in his pastoral work he came

in contact with all classes of people in the city, and that the lynching of Ed. Johnson was a surprise to the people of Chattanooga; that nothing had occurred to cause any apprehension or fear of a mob at that time.

R. pp. 938-940.

Mr. L. G. Walker, editor of *The Chattanooga Times*, the leading morning daily of East Tennessee, and an important witness for the Government in this case, testified on cross-examination that he neither saw nor heard any indications of a mob on the day of the lynching, nor on the evening of the lynching, and that nothing had occurred to cause any apprehension on his part.

R. p. 199.

Mr. Robert A. Pritchard, the city editor of *The Chattanooga Times*, whose duty it was, of course, to gather up all the news and keep in touch with the public affairs generally in the city of Chattanooga, testified that he spent the day on which the lynching occurred around town in the city of Chattanooga, and that the order of the Supreme Court granting Johnson an appeal was discussed very little on the streets that day and caused no excitement whatever. He was asked:

Q. "In your rounds that day and that afternoon, did you hear any suggestion of a mob?"

A. "No, sir."

Q. "Or any danger to Johnson?"

A. "No, sir; I did not hear anything of the kind."

R. p. 888.

Mr. A. N. Sloan, a prominent insurance man, Grand Master of the Masonic Order of the State of Tennessee, and an old resident of the city, testified that his business kept him in touch with all classes of people, that there was no excitement in the city on March 19th in reference to the Johnson case, and nothing had occurred that could lead anyone to suspect that Johnson would be mobbed.

R. pp. 505, 507.

To the same effect is the testimony of:

O. G. Stone, an attorney. *R. p.* 802.

Oscar Yarnell, an attorney. *R. p.* 787.

Thomas H. Payne, a merchant on one of the most public streets in the city, member of the Excise Commission, and member of the School Board of the city. *R. pp.* 942 *to* 945.

R. H. Parrent, a prominent merchant. *R. pp.* 945-948.

James A. Caldwell, an attorney. *R. pp.* 954 *to* 955.

John B. Nicklin, a merchant. *R. pp.* 955 *to* 960.

F. H. Dowler, agent of the Nashville, Chattanooga and St. Louis Railway for eighteen years. *R. pp.* 961 *to* 964.

P. A. Brawner, a manufacturer who employed 450 men. *R. pp.* 965 *to* 971.

Charles Herron, a manufacturer employing about 350 men. *R. pp.* 971 *to* 975.

William E. Love, a manufacturer employing from 75 to 100 men. *R. pp.* 975 *to* 978.

These manufacturers all testified that they constantly mixed with and talked to their employes and that they heard no talk or suggestion of a mob and were all surprised at the

lynching of Johnson, as they had all thought the mob spirit had entirely passed away.

Dr. P. D. Sims, the city physician of Chattanooga, who had lived in the city fifty-one years, and whose profession, as well as his official position, brought him in constant contact with people of all classes, testified to the same situation.

R. pp. 979 *to* 988.

Samuel T. Dewees, a merchant, proved the same facts.

R. p. 990.

John H. Cantrell, a prominent attorney at the Chattanooga bar and a member of the committee that had been appointed by Judge McReynolds to confer with the attorneys for Johnson, after his conviction in the State Court, to decide whether his case should be appealed, and who had necessarily given the case in its various phases close attention, testified that he saw no disposition to lynch Johnson or any indication of a mob after he was sentenced by Judge McReynolds.

R. p. 1005.

M. N. Whitaker, the Attorney-General for the Chattanooga District, who prosecuted Johnson and who kept in close touch with the case from the beginning, testified that he did not apprehend any mob violence at the time Johnson was lynched. Among other thing, he said:

> "I saw no reason to apprehend mob violence to this prisoner after he was convicted by the court and jury, and from that time on up until he was mobbed, and the night he was mobbed, it was a very great surprise and shock to me."

R. p. 874.

S. D. McReynolds, Judge of the Criminal Court at Chattanooga, testified that he was holding Criminal Court at the Court House in Chattanooga on March 19th; that he mixed and talked with the various officers of his court and jurors from various parts of the County; and the usual habitues of the Criminal Court, as well as the attorneys, and that he saw and heard nothing that caused any apprehension of mob violence.

R. pp. 897, 898.

Various other witnesses testified to the same facts and the same general situation.

Here, we have the testimony of the representatives of every class of people, who were in a situation to know, and who must have known, whether there was any excitement in Chattanooga; whether there was any mob spirit manifested on the streets there; whether there was any talk of, or apprehension of, mob violence on March 19, 1906.

These men all agree that no mob was expected and that there was nothing in the situation on that day that caused them, or that should have caused the sheriff to expect the mob that lynched Johnson.

Aside from argument and denunciation, what evidence has the Government produced that Capt. Shipp anticipated a mob on the night of March 19th?

It is said that Capt. Shipp, himself, admitted to a reporter that he expected a mob on the 20th and, hence, should have been prepared on the 19th. To sustain this, the Government relies upon an alleged interview that appeared in *The*

Birmingham Age-Herald, written by a reporter by the name of Evans, based upon a casual conversation with Capt. Shipp and written some hours thereafter.

R. pp. 271, 272.

In this interview, Capt. Shipp is quoted as saying:

> "I had looked for no trouble that night; on the contrary, did not look for it until the next day."
> *R. p.* 269.

On being cross-examined as to this alleged interview, the reporter was asked:

> Q. "Capt. Shipp stated to you, among other things, that he had no expectation of any trouble whatever that night, did he?"
>
> A. "Yes, sir; I think he said that."
>
> *R. p.* 272.

The only other witness on the subject of the anticipation of a mob on Tuesday, March 20th, was J. L. Chivington, the leading witness for the Government in this case, who was asked by counsel for the Government:

> Q. "Mr. Chivington, in reference to the matter you have been asked about with regard to the apprehension of a mob, did you have any reasons in your rounds to apprehend that if Johnson was not hung in accordance with the original order of the State Court on the morning of the 20th, that there would be a mob?"
>
> A. "Yes, sir; my opinion on that Monday and on that night up until the time I heard of this mob, was that if the State Court sentence was not executed on Tuesday morning, that a mob could be reasonably expected on Tuesday night."
>
> *R. p.* 238.

As to what caused this apprehension, he states:

> A. "Yes, sir; I heard people say they were anxious to see what would be done between nine and twelve o'clock on Tuesday. I heard them say that."
>
> *R. p.* 239.

To show that this was all that caused this apprehension, we refer to other parts of the same witness' testimony as follows:

> Q. "After the paper came out, were you on it that day?"
>
> A. "Yes, sir; I was on it all day" (referring to Monday, the day of the lynching.)
>
> Q. "Did you go around the city in performing your reportorial duties?"
>
> A. "Yes, sir."
>
> Q. "Did you mingle with the people?"
>
> A. "Yes, sir. I was in the courts that day. I think the criminal court was in session. I think I was in court."
>
> Q. "I will ask you whether or not the publication of this article on the morning of the 19th created any excitement?"
>
> A. "No excitement that I saw or heard of."
>
> Q. "Did it arouse any mob spirit or anything of the sort so far as you were able to discover in your rounds?"
>
> A. "*No, sir; I did not hear anything about any mob all day.*"
>
> Q. "You had the Johnson case in charge?"
>
> A. "Yes, sir."

Q. "It was your business to look after matters or that sort?"

A. "Yes, sir."

Q. "And you did do it?"

A. "I tried to — yes, sir."

Q. "*If it had created any such excitement or any such spirit, it would have been your business to have ascertained it?*"

A. "*Yes, sir.*"

R. p. 236.

It was further shown by this witness that the girl, who was the victim of the outrage in question, lived some three miles from the city, and that the first mob came from out in the country, east of Missionary Ridge.

R. p. 239.

The Government's counsel show in the examination of this witness that it was reasonable to suppose that any mob that might have been expected would come from out in this neighborhood. In other words, would come from the country people — neighbors of the victim.

It will be remembered that Mr. Justice Harlan granted the first order on the 17th of March. Notice of this was received in Chattanooga on the 18th of March and publication made for the first time in Chattanooga on March 19th. The notice of the action of this Court was received in the afternoon of the 19th. So that if Capt. Shipp did say that he expected there might be trouble on the 20th, just as Mr. Chivington seemed to apprehend, *and that he expected no trouble until that time*, his reasoning was based upon the

idea that the country people would, in all likelihood, not hear or know of the delay in the execution of Johnson until Tuesday, when they would learn that Johnson was not to be executed. And in no event would they attempt mob violence until the time of executing the sentence of the State Court had passed, and this was exactly the reasoning of the Government's leading witness, Mr. Chivington.

It will be noticed that Mr. Chivington, who had this case in charge for *The Chattanooga Times*, and whose duty it was to sound the public sentiment and keep constantly in touch with all phases of the case, and who had mixed with all classes of people on the day of the 19th, heard absolutely no suggestion of a mob, and the only thing he did hear which caused any apprehension whatever, were the statements he refers to of some people who said they wanted to wait and see whether Johnson was hanged on Tuesday. This was not very strong evidence to cause even the most suspicious to have an apprehension that trouble might come even on Tuesday.

No one in the whole community seemed to have even this apprehension, save Mr. Chivington, with the possible exception of Captain Shipp, himself, and both of these gentlemen — one the leading witness for the Government, and the other the defendant — each swear that they had absolutely no apprehension of trouble on the night of March 19.th

The testimony of Julia Woolford, colored, is relied upon. She was a servant in Capt. Shipp's home and testified that she heard Capt. Shipp say one day at the dinner table,

"that if the execution would be stayed, Ed. Johnson would be mobbed."

R. p. 289.

She says that Mr. and Mrs. Hardin, Mr. and Mrs. Myer and Captain and Mrs. Shipp were all present when this conversation occurred.

R. p. 394.

This is denied by all of these parties.

R. pp. 1012, 1014, 1016.

And by Capt. Shipp, himself.

R. p. 1105.

Capt. Shipp states that his wife was in bad health and he purposely refrained from even discussing in her presence the Johnson case, or any other matter that would cause her to be nervous or apprehensive of trouble.

He said that if he had apprehended trouble, she would have been the last person in the world he would have mentioned it to.

Certainly this Court will not disregard the testimony of these respectable witnesses in order to believe the improbable story of a discharged servant as to what she pretends to have overheard of a casual conversation in a family circle.

It is insisted, however, that Capt. Shipp should have anticipated trouble because on the 25th day of January, a mob assaulted the jail and attempted to lynch Johnson.

It is true when the people of Chattanooga and vicinity learned of the horrible outrage that had been perpetrated on an innocent white girl, they were stricken with horror and

indignation, and a mob did attempt to lynch Johnson. This attempt would probably have succeeded but for the vigilance and *foresight* of Capt. Shipp, in taking the negro to Nashville immediately after he was arrested. All the evidence shows, however, that this intense excitement that at first swept over the community, had subsided and entirely passed away.

It is insisted that the abhorrence of the crime did not pass away. This is true, and in the years to come, it will not have passed away. The members of this court today feel the same abhorrence of the crime that the people of Chattanooga feel, but that does not mean that the abhorrence of the crime will drive men to wreak summary vengeance and make them criminals. When the crime was first committed, while the people were excited and maddened by the first news of it,—then the thoughtless, the reckless and the criminal classes took advantage of this public excitement and general indignation and attempted to lynch Johnson. But the excitement subsided and the public generally came to take a rational and sensible view of the situation, and when this occurs the reckless, the thoughtless and lawless usually do not dare to take the law in their own hands.

As a rule, lynchings do not take place months after the crime has been committed by the victim of the mob. One witness said that he had never known of a lynching that did not occur immediately after the commission of the crime that caused the lynching.

This is a matter of common knowledge.

In this case, the crime was committed on January 23d. The mob attempted to lynch the accused on January 25th. On February 6th, thereafter, the prisoner was brought to Chattanooga and tried. At first, he was heavily guarded, but it was soon discovered that the mob spirit had entirely passed away even at that early time, and that no attempt would be made to lynch him. After his conviction, the criminal judge told the sheriff that he might safely leave the prisoner in the jail at Chattanooga, and if he removed him to another jail, he must do so without an order of court, as he (Judge McReynolds) thought the prisoner would be entirely safe in Chattanooga.

R. p. 895.

But as an extra precaution and because he, himself, was utterly worn out and sick, Capt. Shipp placed the prisoner in the jail at Knoxville, where he remained until the *habeas corpus* proceeding before Judge Clark. Notwithstanding the fact that Judge Clark and the Governor stayed the execution for ten days, the prisoner was brought to Chattanooga and placed in jail and kept there without any extra guard from March 11th — eight days before the lynching — and not the slightest attempt was made to do him violence nor the slightest suggestion of a mob heard. So that necessarily, we are correct in insisting that so far as could be seen by a usually prudent person at the time, the mob spirit had entirely passed away.

But it is insisted that Capt. Shipp should have assumed that the action of this Court in granting an appeal would

have aroused public indignation and renewed the mob spirit.

When this Court took jurisdiction, Capt. Shipp understood that Johnson then became a Federal prisoner — protected by the Federal Government. Did he have a right to assume that the lawless element would more readily defy both the Federal and State Governments than the State Government alone?

On the contrary, Capt. Shipp felt that the assumption of jurisdiction by this Court was an added protection to the prisoner.

Judge Clark stated that the people of Chattanooga and East Tennessee generally have always shown the greatest respect for the Federal Courts and its orders and process.

R. p. 882.

Attorney-General Whitaker said:

> "*On account of the great respect of the people for the Federal Government, I would have thought that the action of the Supreme Court in this case would have guaranteed greater safety to the prisoner. That is my opinion.*"
>
> *R. p.* 848.

Rev. Dr. Boswell (*R. p.* 870 *and* 871), and W. E. Love, a manufacturer (*R. p.* 977), expressed the same view.

When asked, if, in his judgment, the granting of an appeal and the taking of jurisdiction by this Court increased Johnson's danger, Mr. Love answered:

> "*I considered that he would be safer because we are sort of afraid of Uncle Sam;* and generally,

> the parties that *do mob, are the bummers, so to speak*, and more afraid of the United States Courts than they are of our local Courts."

SHERIFF SHIPP'S CONDUCT.

The second issue, as set out in the brief for the Government, is as follows:

> "*Did the sheriff and his deputies commit acts and do things manifesting a purpose and disposition on their part to render it less difficult and less dangerous for the mob to lynch Johnson, and aid and abet the mob?*"

Is there anything in Capt. Shipp's conduct that can justify such an attack?

When Johnson was arrested, the sheriff exercised the highest degree of caution and consideration for the prisoner's safety. He took the prisoner immediately out of town — first to Dayton, then to Nashville — where he kept him until the trial, in the early part of February. He brought Johnson back and guarded him during the trial and at the conclusion of the trial, though assured by the criminal judge that the prisoner would be entirely safe in the jail at Chattanooga, the sheriff, being sick and worn out, took the prisoner to Knoxville and kept him until the *habeas corpus* proceeding before Judge Clark. He then brought the prisoner back to Chattanooga. Fearing an incendiary publication, he understood would be made, might cause some excitement and trouble, he arranged to have his deputies meet him at Citico Junction, near Chattanoga, and take his prisoner off the train at that place. He learned, however, that his ap-

prehensions were unfounded and that no one would have attempted violence to the prisoner if he had taken him on to the Central Station.

R. pp. 1094, 1103.

These facts are not disputed. In doing all this, did Capt. Shipp show a disposition to aid and abet a mob in the lynching of Johnson? Having saved Johnson's life from one mob, why should we assume that he would aid and abet another mob in lynching him? No possible motive is shown why he should thus change his attitude towards the prisoner.

It is argued, however, that Sheriff Shipp was a candidate for re-election, and that he aided the mob for political purposes. He was a candidate when the first mob attempted to lynch Johnson. If he dared defy the mob when the excitement was at its worst, when the people of the whole county were in a fever of indignation, why should he aid the mob when the excitement had subsided?

In the brief for the Government, it is said that 1,600 to 1,800 were in the first mob, and that only a few were in the last. If Capt. Shipp dared defy so large a mob, and if his deputies used violence in driving off so large a mob, as it is conceded they did, without fear of political consequences, what political reward could come to him from aiding the few men who composed the last mob?

The victim of the outrage of which Johnson was accused, did not belong to a prominent or influential family, that had a very wide circle of friends. She belonged to an humble though respectable family of northern people, who had re-

cently moved into Chattanooga — her father, an old federal soldier, was engaged in guarding the Forest Hill cemetery.

R. p. 916.

But how could it aid Capt. Shipp's political fortunes to aid or abet a mob in the murder of one of his prisoners? Surely there were too few engaged in the mobbing of Johnson for the votes of the lynchers to be of any great value. Surely it will not be insisted that Capt. Shipp could aid himself politically by having the people of the County understand that he betrayed his trust and aided in the commission of a crime.

The newspapers of Chattanooga were, and have always been, bitterly opposed to mob law — the law-abiding people there, as well as everywhere else, are opposed to mob violence in any case. No intelligent people would trust a man in the important office of sheriff who would betray his trust and assist in the murder of a helpless prisoner.

Can the Court imagine a community in America where public sentiment is so depraved, where the people are so low, that any man would dare go before the public for endorsement admitting that he had assisted or aided in the murder of his own prisoner? Can the Court imagine any community in which the lawless element is in a majority or where a majority of the voters would sustain a man whom they believed had assisted or aided in any way in the murder of one of his prisoners?

The record shows that there is a large colored vote in Chattanooga that is an important factor in the elections in

that city and county. Surely Capt. Shipp did not expect to strengthen himself with these voters by assisting in the murder of a colored prisoner. It is shown that Hamilton County has a cosmopolitan population — made up of people from the north, south, east and west. That there is a large independent vote in Hamilton County. That the offices in Hamilton County are usually divided about equally between the democrats and republicans, so that each party must put forth its best men in order to hope for success.

R. pp. 920, 921.

Surely in a typically American community, such as this is shown to be, an officer could not hope for success on account of the betrayal of his trust, or by aiding in the assassination of his prisoner.

Capt. Shipp is criticised because he went to the jail on the night of the lynching. Let us see how this occurred:

Attorney-General Whitaker and Judge McReynolds, walking along the street about 9 o'clock, noticed a suspicious gathering near the jail? They immediately went to the editorial rooms of *The Chattanooga Times*, and Attorney-General Whitaker called Capt. Shipp at his residence and directed him to go to the jail at once. This is shown by Attorney-General Whitaker (*R.* p. 850); Judge McReynolds (*R.* p. 900), and L. G. Walker, editor of *The Times* (*R.* p. 109.)

The sheriff, when he was called, immediately attempted to call the jail over the 'phone. He got no response, and he immediately apprehended that the 'phone had been torn out

by the mob at the jail. He hurriedly got his coat and hat and started for the jail, running most of the way. He says:

"Just as I got opposite the jail, and just before turning into the walk leading up to the office, I saw five or six men standing out in the middle of the street, and without stopping, going rapidly, I made the remark, 'What is the matter?' No one answered at all. Then I went up the walk and found quite a number of men on the walk and on the steps leading into the office. I made my way through the crowd, shoving them on one side, and got into the office. As soon as I got in, I saw the iron door — outside door — was open. I entered rapidly, and just as I reached the inside of the door, *I saw Mr. Gibson sitting back against the wall with three or four men standing around him.* I had started over to make some inquiries of him, *and just at that time, I was seized fro mbehind by several men* — I don't know how many. When they seized me, I did not know but what they were going to do me some violence, and *I reached back for my gun, which I had in my pocket.* They assured me that they did not intend to hurt me. I was somewhat indignant and stated to them that I wasn't afraid of their hurting me. *They rushed me up the steps and carried me into the hallway that is about the level of the floor that Johnson was on and through which there is a drag which we feed the prisoners by, and stood over me there with a guard during the progress of the work.* They were hammering; I heard them hammering on the door when I entered the office."

Q. "State whether or not you were *kept prisoner there by these people until after they had got Johnson and left the jail with him?*"

A. "*Yes, sir; I was.*"

Q. "I will ask you if, when you reached the jail, you were exhausted from your run, and what the distance is from your house to the jail?"

A. "Well, it is four or five blocks. Yes, sir, I was very much exhausted. I had been under the care of the physician. I had been suffering with intestinal indigestion and was under the care of Dr. Ellis at that time."

R. p. 1106.

Mr. J. L. Chivington, a witness for the Government as to Capt. Shipp's conduct on entering the jail, testified as follows:

Q. "Now, going back a little again. When Sheriff Shipp came to the jail, he was alone?"

A. "Yes, sir."

Q. "Did he move rapidly forward?"

A. "He was running when I saw him."

Q. "He was running? How did he get through the crowd? Did he push himself through, or how did he get through?

A. "He shoved the men aside."

Q. "Shoved them back and entered?"

A. "Yes, sir."

Q. "Did he go at once forward?"

A. "Yes, sir; he never stopped."

Q. "As rapidly as possible — as rapidly as he could get through the crowd?"

A. "He never stopped until he got to that inside door."

Q. "Did he go immediately upstairs where the noise was, or how did he get upstairs?"

A. "No, sir; they carried him upstairs."

Q. "How did they do it? How many men seized him?"

A. "Four or five."

Q. "What did he say to the mob? Did he ask them to disperse?"

A. "Yes, sir; he asked them several times to disperse."

Again, he says:

"He appealed to them not to mob the negro."

R. pp. 232, 233.

Joseph R. Curtis, another reporter on *The Chattanooga Times*, and a witness for the Government, testified as follows:

Q. "Did Capt. Shipp appear on the scene?"

A. "Yes, sir; he came about 9 o'clock; maybe a little after that."

Q. "What did you see him do?"

A. "I did not see him until he was brought up on the second floor. Several of the members of the mob had him by that time, and they brought him up to the second floor. I saw him going up the steps."

Q. "What was he doing?"

A. "*He was talking with them and trying to reason with them, to get them to stop.*"

Q. "Did the Captain make any show of force at all?"

A. "*Well, he didn't have any chance to.*"

Q. "That was not my question."

A. "*Well, he did, yes; but he was overpowered.*"

And again:

Q. "When you say he made a show of force, then you mean talking, do you?"

A. "*No, sir; he resisted their efforts to hold him.*"

Q. "*In what way?*"

A. "*By trying to pull away from them.*"

R. p. 366.

Captain Shipp says that he remonstrated with the mob and appealed to them to let Johnson alone and let the law take its course.

R. p. 1120.

It is argued that by going alone into the jail, Capt. Shipp thus voluntarily put himself in the hands of the mob and made it impossible to summon help or organize a posse on the outside to protect the prisoner.

It is true that the sheriff, probably, showed bad judgment in rushing first to the jail without summoning assistance from the outside. It will be remembered, however, that Capt. Shipp was suddenly called up at his home by Attorney-General Whitaker from the editorial rooms of *The Times* and was asked if he knew what was going on at the jail, and told that he had better go down there at once. The sheriff attempted to reach the jail by 'phone immediately, and when he failed to do this, he grabbed his coat and hat and, though he was sick, ran nearly all the way to the jail. While, perhaps, this was not good judgment, and was not the act of a cool man, it was the act of a brave man, rushing without fear of consequences to the scene of danger — to

his post of duty. That those who knew Capt. Shipp best would expect, and did expect, just such rashness on his part, is shown by the record. Immediately after Attorney-General Whitaker had notified Capt. Shipp to go to the jail, and while he and Judge McReynolds were having a conversation with Mr. Frank Spurlock, a prominent member of the Chattanooga bar and a practicing attorney at this bar, he (Spurlock) said:

> "Now, I know Capt. Shipp very well, and he is liable to rush in there and get killed or kill somebody, and we had better go down there and tell him what we know about the situation so he can go in there and be cautious about it."

These gentlemen attempted to intercept Capt. Shipp, but missed him.

R. p. 900.

How can any reasonable man believe that Capt. Shipp rushed into this jail in order to help the mob? Any mob is a reckless and dangerous aggregation of men, especially when the mob has so deadly a purpose as this mob had. The very sight of the sheriff was liable to have caused any reckless or half drunken member of the mob to have shot him as he attempted to enter the jail. There is not the slightest evidence to establish the insistence that Capt. Shipp went to the jail in order to aid the mob. To reach this conclusion, the Court must also find that Judge McReynolds, Attorney-General Whitaker, Mr. L. G. Walker, editor of *The Times*, and Mr. Frank Spurlock were all in the conspiracy, and that it was part of the plan for these gentlemen

to notify Capt. Shipp to go to the jail in order that he might be held by the mob. The whole insistence is absurd and not sustained by the slightest proof or the slightest reason.

Again, it is insisted that Capt. Shipp should have called for help after he was made prisoner by the mob. He was asked by counsel for the Government why he did not do this. His answer was:

> "I didn't think there was anybody there that would have responded to the call if they had been called upon."
>
> Q. "You did not make any effort at all?"
>
> A. "No, sir, I did not. I made no effort except that I remonstrated with the mob."
>
> *R. p.* 1120.

On re-examination, he testified that no one offered to help him; no one offered to give him the slightest assistance; no one suggested to him that they were willing to come to his rescue or to go for relief.

R. p. 1123.

Was the sheriff in a position to call for help while a prisoner in the hands of the mob? If he had asked someone to go for help, does this Court assume for a moment, the mob would have permitted the messenger to leave the jail and go for assistance? Such a suggestion is not entitled to serious consideration. Capt. Shipp did the only thing he could have done — that was to remonstrate with the mob and appeal to them not to murder the prisoner.

It is insisted that there were law-abiding citizens there

who would have given assistance. If there were, why did they not do so?

Section 7002 of Shannon's Code of Tennessee gives a private person the right to arrest another for any public offence committed in his presence, or for a felony not committed in his presence. Besides, the same moral obligation of a citizen rested upon every man present that devolved upon Capt. Shipp, to protect the life of the prisoner and prevent this public attack on the law. Yet not one thing was done by any of these gentlemen present to indicate that they were not in sympathy with the mob. *The only man who ever remonstrated with this mob was the defendant Shipp. The only man who raised his voice to save the life of the prisoner was defendant Shipp.*

Why should Capt. Shipp have attempted the impossible task of sending word to people on the outside that he was held a prisoner and that a mob was about to lynch Johnson? He knew that people on the outside knew it. He had received the telephone message from Attorney-General Whitaker before he started for the jail. He had every reason to suppose that the public were informed of the situation.

Again, it is insisted that Capt. Shipp should have gone to the rescue of the prisoner and should have organized a posse to pursue the mob after they left the jail. It is insisted that the great body of bystanders would have responded to the sheriff's call if he had attempted to rescue the prisoner. Just who did compose this mob and just who were in sympathy with the mob is hard to gather from this proof. Only

a few had immediate charge of Johnson when they attempted to hang him at the bridge, but these few were surrounded by a large crowd. *And from this crowd hundreds of shot were fired at the prisoner, many of the shots striking him and killing him.* Just who fired these shots or how many participated in firing at the prisoner, the evidence does not show, but the testimony of Mr. Chivington and other witnesses for the Government shows that several hundred shots came from the bystanders.

R. pp. 231, 232.

Not one of these bystanders at any time offered the slightest assistance either to the sheriff or to the prisoner; not at any time, did any of them offer the slightest remonstrance or make the slightest appeal to the mob on behalf of either Johnson or the sheriff.

While the people of Chattanooga all felt a great horror for Johnson's crime, and felt certain that he was guilty, and while they felt the deepest sympathy for his unfortunate victim, and none whatever for Johnson — there were yet many people among the law-abiding citizens of Chattanooga who would have gone to the rescue of this prisoner for whom they had no sympathy and for whose crime they felt absolute horror, not because they felt the prisoner should live, but because they believed the law should not be violated; because they believed that no crime excused or could ever excuse mob violence. But this class of citizens are usually at their homes at night. They are not people who stand around as idly curious observers on occasions like this.

Among these bystanders were a great number of men, doubtless, who would, under no circumstances, have assisted the mob, yet, who felt a sort of sympathy with the mob, and who, under no circumstance, would have risked their lives in a combat with the mob. At any rate, they did not show the slightest disposition to object or interfere in any manner with the action of the mob.

Again, we ask the Court to take into consideration Capt. Shipp's physical condition at this time. He was ill, and as he said, was under the treatment of a physician. For a man of his age, he had had a long and exhausting run from his house to the jail. In this sick and exhausted condition, he had undergone a long nervous strain while he was kept prisoner by the mob, and while his condition at the time the mob left the jail may be imagined, it is clearly shown by the testimony of M. J. Horan, who says he got to the jail just as the mob were leaving. He testified:

> "As I walked in the door, I saw Capt. Shipp, and he was very much excited. In fact, he was *almost in a faint.* He was as white as a sheet. I walked up to him, and he just put his hand on my shoulder and said, 'My God, they have ruined me.' I told Sheriff Shipp to sit down, and he started to sit down. Then he jumped up and said, 'My God, I did everything I could.' I said, 'I know that, Sheriff.' I said, 'You are not to blame; you have done everything a man could have done.' I said, 'No one expected this.' He said, 'My God, no.' I told him to sit down again. I asked him if I could get him a drink, and he shook his head and said 'No.' I asked him if he thought he was going to

> faint, with his head hanging over, and I walked out to see if I could get him a drink of water. I did not see any and I came back and resumed my conversation with him. I told him no one in the world knew anything about it. He said, 'My God, I did not.' I told him no one did. I told him I was down in the street right there at the jail before I heard or saw anything."

Again, he stated:

> "Well, he had all the apperance of a man who was ready to collapse. His face was white and he was trembling, just trembling like a leaf, and under those conditions, I naturally thought he was going to faint and suggested that he sit down, and as he sat down, he threw his hand down like this with his head on his hand."

Again, he said:

> "There were tears in his eyes. * * * In fact you could barely understand what he would say. It was just in a tremble. He would tremble and say a little something in a trembling voice, like a voice, the best I could describe it, filled with emotion."
>
> *R. pp.* 1085, 1086, 1087.

In a short while after the mob left the jail, deputies Galloway and Baker arrived at the jail. They had been with a party of friends playing cards at the Eagles club when notified that the mob was at the jail. They ran from the club room to the jail, but arrived after the mob had left. Capt. Shipp told them to go at once to the bridge where the mob had the prisoner. This, they did.

R. pp. 1079, 1066.

Johnson was dead when they arrived.

R. p. 1080.

It is alleged in the information that the prisoner had been heavily guarded until the night of the lynching and that the guards were purposely withdrawn in order to permit the lynching. The record shows that the jail had not been guarded with extra guards after Johnson's conviction, February 9th. And during the time he had remained in the jail after his return from Knoxville, there had been no extra guard at the jail.

R. pp. 1102, 1080, 1081, 1066.

This is undisputed.

In their brief, counsel for the Government seem to bring a wholesale indictment against the whole citizenship of Chattanooga and Hamilton County. The undisputed testimony of dozens of witnesses is swept aside by the simple announcement that it is absurd and ridiculous. The testimony of gray-haired ministers, of veteran physicians, of merchants, manufacturers, and officials, is all treated in the same manner. To all of these, counsel for the Government say:

> "*It is absurd* for the defendants and their witnesses to say that the community was in a state of peaceful repose on March 19th, or preceding days. *It is idle* for them to say that they did not apprehend mob violence to Johnson."
>
> *Brief, p.* 28.

And yet this fact is testified to by numerous witnesses for the Government *and denied by no witness.*

Judge McReynolds and Attorney-General Whitaker are also severely criticised by counsel for the Government. Just why, it is hard to understand. These gentlemen first

sounded the alarm on the night of the lynching. Walking the streets about 9 o'clock and noticing a suspicious gathering at the jail, they went to the office of *The Chattanooga Times* and notified the editor and reporters of what was going on — called the sheriff and requested him to go to the relief of the prisoner — 'phoned to the office of the chief of police — and, in fact, did everything that could have reasonably been expected of any citizen under the circumstances.

Judge McReynolds treated Johnson with every consideration throughout the whole proceeding. He appointed able counsel to defend him, and after his conviction, appointed a committee of other able counsel to confer with his attorneys and render such assistance and advice as the case demanded. When counsel were appointed and before Johnson was tried, Judge McReynolds and the Attorney-General had the sheriff submit to the counsel appointed to defend Johnson all of the evidence the State had against the accused and also give Johnson's counsel the names of the witnesses for the State — a consideration for the defendant seldom, if ever before, shown in the criminal courts of this State.

After Johnson was lynched, Judge McReynolds delivered a strong charge to the grand jury, instructing that body to indict all those engaged in the lynching. Both he and Attorney-General Whitaker did everything possible to procure indictments. That the grand jury failed to indict any of the lynchers is not strange in view of the difficulty that the Government, with all of its agents and detectives,

have had in establishing the identity of those engaged in the lynching. These splendid officials need no defense at our hands. But it is quite a coincidence that counsel for the Government in their brief, criticise most severely those who did the most to avoid the lynching of Johnson.

As before stated, it is possible that Capt. Shipp acted with poor judgment on the night of the lynching. It is easy to see now that he should have had the jail guarded and should have been prepared for a mob. But if he had done so, he would have been wiser and would have shown more foresight than any other citizen of Chattanooga.

It is easy to see now, looking back over events as they occurred on that night, that Capt. Shipp, instead of going to the jail, should have gone to police headquarters or the armory, where the militia were drilling, and organized a posse. It must be remembered, however, that Capt. Shipp did not have time to carefully consider the situation and coolly decide the best course to pursue. He was called up in the night and told by the prosecuting attorney that he should go at once to the jail — the Attorney-General showed just as poor judgment as did Capt. Shipp. The Attorney-General was in conference with several other gentlemen, including the Criminal Judge, and in requesting the sheriff to go at once to the jail, he (the Attorney-General) spoke not only for himself, but for the other gentlemen present, showing that in the excitement of the moment, all of them were guilty of the same error of judgment that Capt. Shipp was.

The testimony heretofore cited shows that Mr. Spurlock, who was with the Judge and Attorney-General, after thinking the matter over, concluded that it would be foolish and, perhaps, dangerous, for the sheriff to rush into the jail alone, and knowing Capt. Shipp's temperament, he knew he would attempt to do this. For this reason, they attempted to intercept the sheriff, but failed to do so.

Certainly Capt. Shipp cannot be convicted for contempt of this Court simply because in the performance of his duties, he exercised bad judgment. He says, himself:

> "If I had perhaps had the thing to go over again, I, perhaps, would know better what to do, and would act differently. But I was acting at that time on the spur of the moment and had gone there for the purpose of seeing what the trouble was and to do what I could to protect the prisoner."
>
> *R.* pp. 1122, 1123.

Capt. Shipp denied, in his testimony, all the charges in the information with reference to a conspiracy with those engaged in the lynching. He denied any intention to aid or abet, in any way, those engaged in the killing of Johnson. He denied that he anticipated or had any reason to anticipate or expect a mob on the night of March 19th. He insisted that he had the very greatest respect for this honorable Court and had done no act, and omitted no duty, from which a contrary conclusion could be drawn.

Capt. Shipp has lived in Chattanooga since 1874. During that time has been engaged in various business enterprises. During the time he has lived in Chattanooga he has

been connected with various public affairs in that city. He was a Confederate soldier, and has, for many years, been a member of the Confederate Veterans' organization, and is quartermaster-general of the entire organization. He was on the staff of the late Gen. John B. Gordon and the late Gen. Stephen D. Lee. He has been a Mason for over forty years and a member of numerous other secret societies. He was also tax assessor for Hamilton County, Tennessee, before elected to the position of sheriff. His splendid character is testified to by every witness whose testimony has been referred to in this brief. Old men and young men, political friends and political adversaries, ministers of all denominations, veterans of the Civil War who wore the blue and who wore the gray, men of all classes and all persuasions who have known Capt. Shipp during his long life in Chattanooga, all, in one voice, say to this Court that he is a truthful, law-abiding, honorable gentleman. Can this Court say that a man with such a character and such a record, would suddenly, without any motive whatever, betray his trust, sacrifice the life of a prisoner in his keeping, become a perjurer and a murderer, in order to show his contempt and disregard for the orders of this, the highest and greatest Court in the world.

Respectfully submitted,

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